IN THE SUPERIOR COURT OF GUAM

GOVERNMENT OF GUAM and EDNA T. PAULINO,	)	CIVIL CASE NO. CV1426-03
Plaintiffs/*Kehante siha,*	)	
v.	)	*DISISION YAN OTDEN*[1]
PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC. dba PACIFICARE ASIA PACIFIC,	)	
Defendant/*Difendante.*	)	

The Court heard Defendant's Motion to Confirm and Enforce the October 1, 2003 Arbitration Award, to Issue Judgment, and to Vacate the Court's Temporary Restraining Order on October 16, 2003, in addition to Plaintiff's Motion to Vacate the same Arbitration Award. **Eric A. Heisel,** Esq., Assistant Attorney General, Solicitors Division and **Douglas B. Moylan**, Esq., the Attorney General of Guam, represented the Plaintiffs, the *Government of Guam and Edna T. Paulino.* **Randall Todd Thompson,** Esq. and **David A. Mair,** Esq., of Mair, Mair, Spade & Thompson, P.C., represented the Defendant, *PacifiCare Health Insurance Company of Micronesia, Inc. dba PacifiCare Asia Pacific.* The Court, having listened attentively to the arguments presented by the parties, took decision of the motions under advisement. After having given much thought, consideration, and deliberation to the parties' arguments,

[1] Decision and Order

their memoranda of law, the exhibits entered into evidence as well as the pleadings herein, the Court now renders this Decision and Order.

I MANMALOFFAN[2]

On September 17, 2003, the **GOVERNMENT OF GUAM** (hereinafter referred to as GovGuam) filed a complaint and simultaneously sought ex parte Injunctive Relief against **PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC. dba PACIFICARE ASIA PACIFIC** (hereinafter referred to as PacifiCare). Therein, GovGuam sought a restraining order to prevent PacifiCare from terminating any medical or dental coverage to GovGuam employees and retirees after September 30, 2003, pending an arbitration proceeding between the parties. GovGuam's ex parte application was heard on September 18, 2003. Defendant PacifiCare appeared and opposed the restraining order. The Court continued the hearing to September 19[3], at which time, it issued an order which restrained PacifiCare from terminating any medical or dental coverage to GovGuam employees and retirees until further order of the Court. Thereafter the parties proceeded to arbitration. On October 1, a three-member arbitration panel issued its unanimous decision and relieved PacifiCare from any further obligation to provide medical or dental coverage to GovGuam employees and retirees. PacifiCare has filed the present motion which seeks to confirm the award, vacate this Court's restraining order and enter judgment in accordance with the arbitration award. GovGuam, on the other hand, has filed a motion which seeks to set aside the arbitration award. In furtherance of this

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[2] Background

[3] It appeared at the said hearing that the parties could settle the issue between themselves, so the Court continued the ex parte application to the next day.

endeavor, it has amended its complaint and has brought in as an additional complainant (Edna T. Paulino) who argues that the arbitration proceeding was a denial of her rights under Guam's Consumer Protection laws. The Court heard the parties' oral arguments on October 17, 2003. Having listened attentively, the Court took the motions under advisement at the conclusion of the said hearing.

DINISKUTA[4]

Since 1973, GovGuam and PacifiCare have entered into an Agreement which has allowed them to enter into yearly renewal contractual relationships whereby PacifiCare would provide medical and dental coverage for employees and retirees of GovGuam based upon rates agreed upon by both parties. When this agreement began in 1973, PacifiCare was then known as "FHP". It has been thirty (30) years since PacifiCare and GovGuam have worked under a basic agreement, an agreement where their relationship persists pursuant to a "continuing clause" therein. For the most part, the parties have agreed upon benefits and rates. But, despite the "continuing clause" in their agreement, the parties have had disputes with the meaning of the said clause in the past. Their dispute has taken the parties before arbitration and ultimately to the courts. PacifiCare, then known as FHP, and other health providers have taken GovGuam to Court in a series of cases to enforce the terms of the basic agreement. In their initial dispute, GovGuam took the position that the "continuing clause" was invalid and sought termination of the health insurance agreements. The Superior Court, however, determined the "continuing clause" to be valid and binding upon the government. This determination by the Superior Court was affirmed b the Appellate Division of the District Court of Guam, then the appellate body for hearing

[4] Discussion

appeals from the Superior Court. Thus, under the Court's holding in this series of cases, GovGuam could not terminate the agreement against PacifiCare or against ay other health provider, unless specifically authorized and provided for under the basic agreement. Thus, GovGuam has been required to work with PacifiCare in agreeing upon medical and dental coverage and their rates for the past years. It is against this background that the present controversy has developed.

During the current fiscal year [on July 25, 2003 and continuing for a period in excess of six (6) days[5]], PacifiCare and GovGuam entered into negotiations for new medical and dental coverage (benefits) and their rates for the next fiscal year, to commence October 1, 2003. The parties, however, were not able to reach agreement regarding medical coverage, although an agreement was reached regarding dental coverage. On August 26, 2003, PacifiCare sent a letter to GovGuam, demanding arbitration of their dispute which lead to their impasse. PacifiCare asked that the arbitration consider the following issue relative to its dispute with the Government of Guam:

> 1. PacifiCare maintains that the Agreement does not permit Defendant to proceed with open enrollment for Fiscal Year 2004 by permitting government of Guam employees and retirees to select PacifiCare at Fiscal Year 2003 rates and benefits.
>
> 2. **PacifiCare maintains that under federal law and the Agreement, it is merely required to offer renewal of coverage for Fiscal Year 2004 at rates and**

[5] See letter of August 26, 2003, from PacifiCare to Government of Guam Re Notice of Impasse and Demand for Arbitration.

benefits that PacifiCare deems appropriate. PacifiCare further maintains that it has fulfilled this obligation by making several offers of renewal and that PacifiCare's last offer has been expressly rejected by Defendant. **As a consequence, PacifiCare has no further obligation to provide any medical or dental coverage for Government of Guam employees and retirees for fiscal Year 2004**; or

3. In the alternative, if PacifiCare is required to provide any medical or dental coverage to Government of Guam for Fiscal year 2004, and PacifiCare does not have the right under federal law or the Agreement to determine the appropriate rates and benefits, then PacifiCare maintains that such rates and benefits must be decided by mutual agreement or binding arbitration; or

4. In the alternative, if PacifiCare is required to provide any medical or dental services to Government of Guam for fiscal Year 2004, and the rates and benefits are different than those provided in Fiscal Year 2003, then PacifiCare maintains that the new rates and benefits for fiscal year 2004 should be effective as of October 1, 2003.

Subsequent to its arbitration demand letter to GovGuam, PacifiCare published notices in the Pacific Daily News on September 3, 4, and 5, 2003, advising all government employees and retirees that it would not offer any medical or dental insurance coverage to GovGuam employees and retirees after September 30, 2003. Based

upon these notices, Plaintiff, the government of Guam filed a complaint on September 17, 2003 and sought a restraining order preventing PacifiCare from terminating coverage of GovGuam employees and retirees pending the arbitration. This Court agreed with Plaintiff and ordered PacifiCare not to terminate coverage [because there was a pending arbitration proceeding] until further order of the Court. The parties proceeded to arbitration on September 30 and on October 1, 2003, the three-member arbitration[6] panel unanimously announced its award. The decision stated:

> Pursuant to 1.01.21 of the Arbitration Agreement, the Award is hereby rendered.
>
> 1. PacifiCare made offers for renewal of medical coverage for fiscal year 2004 at rates and benefits that PacifiCare deemed appropriate. The Government of Guam did not accept said offers. Under the provisions of the Health Insurance Portability and Accountability Act, 42 USC 300 gg-12(a), PacifiCare met it[s] obligations and is under no further obligation to negotiate or to provide any medical health insurance plan to the Government of Guam for fiscal year 2004.
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> 2. Pacificare is also relieved of any obligation to renew its contract with the Government under the "continuing clause" in its Agreement with the Government of Guam. *Government of Guam vs. FHP, Inc., et al.*, Civ. Nos. CV0809-89, CV0755-89, CV1200-89 and CV1250-89 (Super.Ct. Guam), on

[6] Under the arbitration agreement, PacifiCare and GovGuam each appointed an arbitrator and the two arbitrators selected a third member.

appeal as Civ. Nos. 90-00014A, 90-0002[6]A, 90-00040A (D. Guam App. Div. 1991).

Defendant Pacificare has now moved to confirm the award, vacate the temporary restraining order and enter judgment in accordance with the award. Plaintiff Government of Guam has now moved to set aside and vacate the arbitration award.

I. STANDARD OF REVIEW

The Supreme Court of Guam has set the appropriate standard which must be employed by this Court in determining whether to confirm or set aside arbitration awards. In *Sumitomo Construction Co., Ltd. v. Zhong Ye, Inc.*, 1997 Guam 8, the High Court stated:

> The legislature modeled Guam's arbitration statutes after the United States Arbitration Act. Generally, when a legislature adopts a statute which is identical or similar to one in effect in another jurisdiction, it is presumed that the adopting jurisdiction applies the construction placed on the statute by the originating jurisdiction....
>
> We can properly assume that the legislature meant to adopt the federal construction of Guam's arbitration states when it patterned those provisions after the United States Arbitration Act.....we believe that use of federal interpretations would give proper effect to the legislature's objectives.
>
> When reviewing the decision of a lower court confirming an arbitration award, questions of

law are reviewed de novo while questions of fact are reviewed under the clearly erroneous standard.... These same standards apply to the trial court's review of the arbitrator's award.....

In arbitration cases decided under the federal act, the scope of review is quite narrow. This is complementary to a policy favoring consensual agreements and guaranteeing enforcement of contractual terms between the parties. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985). Although a serious question may arise as to the arbitrator's view of the law, an award "will not be set aside by a court for error either in law or fact ... if the award contains the honest decision of the arbitrators, after a full and fair hearing of the parties." *Coast Trading Co., Inc. v. Pacific Molasses Co.,* 681 F.2d 1195, 1198 (9th Cir. 1982) (citations omitted). In other words, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision." *Advest, Inc. v. McCarthy,* 914 F.2d 6, 9 (1st Cir. 1990) (citations omitted). With these standards in mind, we now address Guam's arbitration laws.

Arbitration awards are binding unless certain limited exceptions exist upon which a court may vacate the grant. Specifically, upon

application of a party, a court may vacate the award under the following circumstances:

> 1. Where the award was procured by corruption, fraud, or undue means.
>
> 2. Where there was evident partially or corruption in the arbitrators, or either of them.
>
> 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> 4. Where the arbitrators exceeded their powers, or so imperfectly executed them so that a mutual, final, and definite award upon the subject matter submitted was not made.
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> 7 GCA § 42108(a)-(d).

In *Sumitomo,* the Supreme Court of Guam, while recognizing the judicial doctrine formulated b the courts as a basis for setting aside an arbitration award, left open the question whether it would adopt "manifest disregard of the law" as an appropriate circumstances for vacating and setting aside an arbitration award.

II. RELEVANT GUAM LAW/CONTRACTUAL PROVISIONS

A. GUAM LAW

4 GCA §4301. Group Insurance.

(a) The Governor is authorized to enter contracts and reject proposals, with the written concurrence of the Speaker of the Guam Legislature or the Presiding Judge of the Superior Court of Guam whose consents may be withheld in their sole discretion, with one (1) or more insurance companies, authorized to do business in Guam, for group insurance, including, but not limited to hospitalization, medical care, life and accident, for all employees or separate groups of employees of the government of Guam.....

(b) All participation by employees in such contracts of insurance shall be on a voluntary basis. Effective in the next contract following the enactment of this subparagraph, the government's contribution for health and dental insurance shall be uniform within each class (including separate classes and rates for retired employees and their survivors) for all competing plans and shall not be less than fifty percent (50%) of the lowest premium for a single employee, except that the government shall increase the contributions it makes on behalf of a retired employee or survivor of a retired employee so that the retired employee or the survivor of a retired employee contributes no more than an active employee who is otherwise in the same class.

.....

(f) Any insurance company or health maintenance organization offering group health coverage under this section may at its sole option, offer two (2) plans with different premiums and/or benefits, only one of which plans may offer a rebate, with all members of both plans being in the same risk pool. The plan offering the rebate or refund

shall base the same on the claims made by the plan members under the plan.

(g) The Governor of Guam shall incorporate the **continuing provisions clause** made available to Guam Memorial Health Plan, FHP, Inc. and Staywell, which was the subject of the District Court of Guam Appellate Division Case Government of Guam v. FHP, Inc., (D. Guam App.Div. 1991), in the government's group health insurance agreement with any health insurance company, or its assignees or successors, which has contracted with the government of Guam for at least two (2) consecutive years. This Subsection shall be retroactive to include any insurance companies falling within said classification for the past five (5) years from the date of enactment of this Subsection, regardless of whether they currently have a group health insurance contract with the government of Guam, and shall entitle the group health insurance company to immediately enter into a contract with the government with said continuing provision included. In the event that the government had already negotiated the terms of a contract with a group health insurance company qualifying herein, but not executed the contract, said contract shall be offered to the insurance company with the continuing provision incorporated.

B. CONTRACTUAL PROVISIONS

2.1 Term. This contract, in its original form, because effective August 1, 1973. It shall renew automatically for one year each October 1st unless terminated for major default in availability or quality of services, given by written notice from the Government of Guam to PacifiCare not less than ninety (90) calendar days before the renewal date, or unless modified by mutual agreement. Time is the essence of the covenants of this paragraph.

3.1 Rates. PacifiCare guarantees the rates set forth in Attachments 1-A and 1-B.

5.1 Schedule of Renegotiations and Open Enrollment. The following will be used in annual rate and benefit negotiations. PacifiCare and GovGuam will make best efforts to adhere to this schedule. Time is of the essence to the covenants in this paragraph.

5.1.1. May 15. Contractor submits new rate and benefit proposals and supporting data……

5.1.2. August 1. Best efforts will be made to agree upon rates with all Health Insuring Organizations.

8.14. PacifiCare guarantees the negotiated rates shall remain in effect for the negotiated benefits for the contact year.

C. ARBITRATION PROCEDURE

1.01 Any dispute or controversy between the parties arising under this Agreement shall be submitted to binding arbitration. Arbitration is initiated and required by giving notice specifying the issues to be arbitrated.

……..

Section 2. The parties acknowledge that the revisions to the arbitration procedures made herein do not change the effect of the decision of the District Court of Guam Appellate Division in Civil Case No. 90-00014A on the agreement. In addition, Chapter 32 of Title 5 of the Guam Code Annotated, more commonly referred to as the "Deceptive Trade Practices-Consumer Protection Act", states at Section 32104(c) that an agreement to arbitrate constitutes an important waiver of the right of access to the courts which must be expressly waived in writing. In consideration of this amendment to the Agreement, the Government of Guam

agrees that the arbitration procedure herein shall be a part of the Agreement each year that the Agreement renews. The Government of Guam does hereby expressly waive any application of the provisions of Section 32104(c) of the Deceptive Trade Practices-Consumer Protection Act to the Arbitration Procedures of the Agreement, as now amended, or as amended in the future. The signatures of the parties' attorneys below confirm that both parties were represented by legal counsel in the procuring of this agreement to amend the Agreement.

III. DEFENDANT'S MOTION TO CONFIRM AND VACATE ORDER

On October 3, 2003, Defendant PacifiCare moved this Court to confirm the arbitration award, vacate its restraining order, and enter judgment in accordance with the arbitration award. PacifiCare sets forth the following principles in support of its motion, which briefly may be summarized as follows:.

A. THE FAA AND GUAM LAW FAVORS CONFIRMATION

In this regard, PacifiCare reminds the Court that Section 1.01.24 of the Arbitration Agreement provides that the parties are bound by the arbitration award. It is PacifiCare's contention that Guam precedent (*GG vs. FHP*, 1991 WL 275584, *Sumitomo vs. Zhong Ye*, 1997 Guam 8, 1997 WL 471506, and a recent 9th Circuit Ct. Case – *Kyocera vs. Prudential*,.. support confirmation of the award. PacifiCare also reminds the Court that a high deference is given decisions of arbitration awards.

B. THE ARBITRATORS DID NOT EXCEED THEIR AUTHORITY

Pacificare points out that in its demand for arbitration, it specifically asked the arbitrators to make a ruling on the "continuance clause", i.e., whether **PacifiCare had any further obligation to provide any medical or dental coverage for Government of Guam employees and retirees for fiscal Year 2004.** It argues that even if this demand were ambiguous, the Arbitrators did not exceed the scope of their charge under *Sumitomo*, supra, and *Brown vs. Dillingham Const. Co.*, 2003 Guam 2. PacifiCare further cites the Court to a myriad of federal cases which all stand for the proposition that arbitrators do not exceed their charge by reaching matters not covered under arbitration demand.

C. COURT SHOULD VACATE ORDER IN LIGHT OF ARBITRATION AWARD

It is PacifiCare's request that this Court should vacate its order requiring PacifiCare to continue to provide medical and dental coverage to Government of Guam employees and retirees in light of the Arbitrators' decision that PacifiCare has not further obligation to GovGuam under its "continuing clause" Agreement once GovGuam rejected PacifiCare's offers for medical coverage.

IV. PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD

On October 6, 2003, Plaintiff GovGuam amended its complaint and an additional Plaintiff was added, namely, Edna T. Paulino, a Government of Guam employee who currently has medical coverage under PacifiCare's health plan. With Paulino as an additional Plaintiff, GovGuam moved this Court to vacate and set aside the Arbitration Award. GovGuam sets forth the following principles in support of its motion, which can briefly be summarized as follows:

A. An arbitration award can be vacated on grounds that the panel exceeded its powers.

GovGuam cites 7 GCA §42108(d) which authorizes a court to vacate an award where "the arbitrators exceeded their powers or so imperfectly executed them" so that a mutual, final and definite award on the matter submitted was not made. Plaintiffs refer to *Allen v. Interstate Exchange of Automobile Club of Southern California,* 80 Cal. Rptr. 247, (1969) and *Sumitomo,* with regard to the proper standard of review.

B. The Arbitrators exceeded their authority because the arbitration clause was unenforceable.

GovGuam argues that 5 GCA §32104(c) of the Consumer Protection Act, as interpreted in *Deluna v. GMHP,* CV96-0025A (April 23, 1998 D. Ct. App.Div.), invalidates the arbitration clause contained in the Agreement between the parties. The *Deluna* case involved a suit by the named plaintiff against GMHP to enforce the medical provisions of his wife's employer group health insurance plan after his wife incurred medical expenses and died from injuries received in an automobile accident. In *Deluna,* this Court dismissed Plaintiff's complaint (without prejudice to the proceedings in arbitration) for failure to state a claim, holding that *Deluna* was not a consumer with regard to GMHP. This Court further held that it would be unreasonable and practically impossible to have every employee of an employer negotiating health benefits to bring a lawyer to review and cosign every benefit plan containing an arbitration clause. This Court then remanded the matter to arbitration.

On appeal, the District Court Appellate Division held that Deluna was indeed a consumer under the Consumer Protection Act even though the contract under which he was a beneficiary was negotiated between the employer and the health insurance provider. More importantly, the Appellate Division held that 5 GCA §32104(c) of the Consumer Protection Act made the binding arbitration provision of GMHP's agreement unenforceable against the claim presented by Deluna.

The Court observes that in order for GovGuam to raise the issue, it was necessary to amend its complaint and bring into the current litigation a complainant, who would have parity with Deluna, i.e., a third party beneficiary under a contract for health insurance executed between the consumer's employer and a health provider, namely, Edna T. Paulino.

Plaintiffs assert that Paulino has the right to have her dispute as stated in the amended complaint heard before the Superior Court and not before arbitration.

C. The Arbitrators failed to execute their duty to resolve the rate dispute.

GovGuam contends that the Arbitrators did not arbitrate rates as required to under the Agreement but rather referred to federal law for support in finding Pacificare was no longer bound under the Agreement. Plaintiff contends that under *GovGuam vs. FHP*, rate disputes are submitted to arbitration. Instead of resolving this dispute, the arbitrators terminated the contract. GovGuam further contends that the impasse which occurred resulted from the parties' inability to agree on rates and benefits. Arbitration could have determined this dispute.

D. Arbitrators exceeded their authority in allowing PacifiCare to terminate the agreement.

Plaintiffs contend that the arbitrators' authority is limited to those provisions that appear in the contract. It is the government's contention that as a matter of general principle of law, arbitrators decided disputes arising out of the contract, not the contract's every existence. Plaintiffs point out that the contract provides no basis for termination of the Agreement by PacifiCare; that the arbitrators exceeded their authority in allowing PacifiCare to terminate the contract. Thus GovGuam essentially argues that the issue regarding termination is not an arbitrable issue.

In support of their contention, Plaintiffs cite the Court to the series of Superior Court cases in which GovGuam argued the lack of enforce ability of the continuing clause provision in FHP and GMHP's contracts. The three Superior Court cases all hold the "continuing clause" provision to be valid and binding upon the government and could not be a basis for termination by the government should an impasse develop on medical and dental benefits and rates.

E. Arbitration does not apply to issue whether offers have been accepted.

Paragraph (b) of PacifiCare's demand for arbitration provides that it would merely be required "to offer renewal of coverage for Fiscal Year 2004 at rates and benefits that PacifiCare deems appropriate". GovGuam argues that as a condition precedent to arbitration, PacifiCare must have offered a renewal of coverage for Fiscal Year 2004. GovGuam submits that PacifiCare never complied with this condition precedent because it withdrew Option A (the plan responsive to GovGuam's Invitation to Bid) on the first day of negotiations before GovGuam could accept the said plan.

F. The Arbitrators exceeded their authority in allowing PacifiCare to terminate its services immediately.

GovGuam argues that its PacifiCare agreement [in light of its continuation clause], if terminated, should be terminated only within a reasonable time and not at will. If PacifiCare is allowed to terminate the contract, it should be required to provide insurance coverage for at least 180 days prior to discontinuance of coverage. See 42 U.S.C. §300gg-12(c)(2). The arbitrators exceeded their authority because they allowed PacifiCare to discontinue services immediately rather than allowing a reasonable time for termination.

HEARING ON MOTIONS

At the hearing on the motions, the parties appeared and reinforced their respective positions. The parties presented further opposition arguments to the other's motion in addition to the opposition contained in their briefs. In total, the parties presented their oral arguments for approximately three hours.

During oral arguments, PacifiCare advised the Court that the company was losing approximately $400,000.00 per month if required to continue providing medical coverage at existing Fiscal Year 2003 rates, a factor to be considered in assessing PacifiCare's continued ability to remain a viable entity.

GovGuam, on the other hand, pointed out that PacifiCare has benefited throughout the years of its relationship with GovGuam. All GovGuam was asking was that medical benefits and rates be established through arbitration[7]. Moreover, the government contends that the

[7] It is GovGuam's position that the Court should establish benefits and rates if it set aside the arbitration award. If, however, the

arbitration panel never made a finding that PacifiCare's continued participation as a health insurance issuer with GovGuam was economically impossible.

In determining the outcome in this matter, the Court must be mindful that the Supreme Court has determined that the Court's review of an arbitration award is limited and quite narrow. As to the law, it is de novo, but as to questions of fact, it is under the clearly erroneous standard. Although a court may have serious questions about the arbitrators' view of the law, an award will not be set aside even if decided erroneously if the award contains the honest decision of the arbitrators. As long as the arbitrators are construing and applying the contract and acting within the scope of their authority, a court's conviction that the arbitrators made a serious mistake or committed a grievous error will not suffice.

The Court must confirm the arbitration award, unless GovGuam presents a legally justifiable basis for vacating the award. GovGuam, thus, bears the burden in this regard. Therefore, the Court must primarily address GovGuam's motion.

Effect of the Consumer Protection Act and the *Deluna* case

GovGuam has argued that its arbitration clause with PacifiCare has been rendered unenforceable by 5 GCA §32104(c) of the Consumer Protection Act and the *Deluna* case. In *Deluna,* the Appellate Division held that Deluna [a third party beneficiary under a contract for health services between Deluna's wife's employer and the health insurance provider] was a consumer of services with regards to the

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Court was hesitant in doing so, then the benefits and rates issue should be determined through arbitration.

health insurance provider. As a consumer, Deluna was not bound by the arbitration provision between employer and the health insurance provider, unless each party (Deluna and GMHP) was represented by an attorney and the arbitration agreement was signed by the attorneys representing each party.

When this Court, then sitting as the trial court, decided Deluna, it determined that Deluna's employer, Big Eye Helicopter, was the consumer referenced under the Consumer Protection Act rather than Deluna because it was the employer who negotiated the contract on behalf of its employees. This Court also found the group coverage plan was provided to the employer, Big Eye Helicopter, and not Deluna.

In this controversy, it is the Government of Guam and not Paulino which sought a resolution of its benefits and rates dispute with Pacificare. It is the Government of Guam and not Paulino which entered into and participated in the arbitration proceedings. It is the Government of Guam and not Paulino which has an agreement with Pacificare which provides for medical and dental coverage and which, among others, contains a "continuing clause".

In *Deluna*, the issue was whether GMHP's arbitration clause was enforceable against Deluna, a beneficiary of her employer's group with GMHP. With regard to the setting aside of the present arbitration award, the issue is whether PacifiCare's arbitration agreement is enforceable against the Government of Guam. Applying 5 GCA §32104(c) of the Consumer Protection Act, the Court finds that it is enforceable. Both parties were represented by attorneys when the agreement was signed and the agreement was also signed by the attorneys for the parties. Paulino has no standing to challenge the present arbitration award as she

was a party to it nor does she have an arbitrable claim with regards to the setting of benefits and rates between PacifiCare and GovGuam. Thus, the Court finds that the Consumer Protection Act and the *Deluna* case do not support GovGuam's claim that its dispute with PacifiCare may not be submitted to arbitration.

The Arbitrators exceeded their authority.

GovGuam argues that the arbitrators exceeded their powers because it exceeded their powers because it addressed the issue of termination which was not an issue in which impasse had been reached in negotiations. Prior to the negotiations, the parties executed GovGuam's Enclosure 9A, the Government of Guam Administrative Procedures for the Negotiations for FY 2004 Employee Health Plan Contracts, Arbitration Exhibit 14. Section A required the parties to enter good faith negotiations. Section 1 contained provisions regarding impasse. It provided:

> 1. If the teams cannot reach agreement on a particular issue, that issue shall be set aside, if at all possible, and the negotiations proceed with. Such issue may be revisited at a later stage at the negotiations.
>
> 2. An impasse on a particular issue shall only be declared after all other issues have been discussed. Further, an impasse on a particular issue shall be declared after both teams have presented oral arguments and fully considered the arguments of the other team, and both teams have stated that they are unwilling to make further compromises.

3. Neither team shall request arbitration until both teams have agreed that an impasse exists, or until good faith negotiations have been held for at least six days and agreement on a particular issue has been exhaustively pursued.

4. **A request for arbitration shall be confined to those issues to which resolutions was earnestly sought at the negotiating table but was not reached.**

GovGuam asserts that the only matters which it negotiated with PacifiCare were medical and dental rates and benefits. Unilateral termination by PacifiCare was not an issue that was negotiated. The arbitrators exceeded their power when they allowed PacifiCare to terminate the contract.

In addition to the above, GovGuam contends that the issue whether PacifiCare could unilaterally terminate a contract is not an issue "that arose under the contract". Thus, it is not a type of dispute which comes within the meaning of Section 1.01 of the arbitration agreement. GovGuam contends that only disputes regarding rates and benefits, disputes whether the parties negotiated in good faith or when rates and benefits become effective are the types of disputes that may arise under the agreement. In this regard, GovGuam contends that termination is not an arbitrable issue.

The arbitrators manifestly disregarded the law.

GovGuam also argues that the arbitration award should be set aside because the arbitrators **manifestly disregarded the law.** In Sumitomo, the Supreme Court

recognized that Courts may vacate an arbitration award for manifest disregard of the law. The Court stated:

> Arbitration awards have been vacated based on a "manifest disregard of the law." *Todd Shipyards Corp. v. Cunard Line Ltd.*, 943 F.2d 1056 (9th Cir. 1991). This exception is not statutory but rather a judicially recognized federal exception introduced by the United States Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The Second Circuit has described the exception in the following manner:
>
> > Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. (citations omitted). The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. ...Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have

> been ignored by the arbitrators must be well defined, explicit, and clearly applicable.
>
> *Carte Blanche v. Carte Blanche,* 888 F.2d 260, 265 (2nd Cir. 1989) (citations omitted).

It is GovGuam's contention that the arbitrators manifestly disregarded the express provisions in the contract regarding termination. GovGuam can terminate under Section 2.1 of the contract for major default in the availability or quality of services provided by PacifiCare. Section 2.3 provides for termination due to a lack of appropriations from the Guam Legislature. Section 2.2 authorizes PacifiCare to suspend their performance or terminate membership with respect to any member whose premium has not been paid. But most important, **GovGuam contends that Section 2.1 also requires an automatic continuation of the contract.** GovGuam argues that it is clear on the fact of the agreement [and is capable of being readily and instantly perceived by the arbitrators] that PacifiCare could not terminate the agreement if the parties were unable to agree on benefits and rates.

GovGuam also argues that the arbitrators manifestly disregarded the law when they decided that PacifiCare could terminate the agreement pursuant to 42 U.S.C. §300gg-12(a) when GovGuam rejected its offers to renew, this result, when the statute referenced mandates the opposite. It is argued that the referenced federal statute requires a health insurance issuer (PacifiCare) to renew or continue in force health insurance coverage at the option of the plan sponsor (GovGuam). The provision of the statute cited by the arbitrators contain no express provision that allows PacifiCare to do what the arbitrators have allowed it do.

GovGuam also argues that the arbitrators disregarded the rulings in the Superior Court and the Appellate Division of the District Court cases. The arbitrators cite CV0755-89, CV0808-89, CV1200-89, CV1250-89 (the Superior Court cases), and District Court case Nos. 90-00014A, 90-00026A, and 90-00040A in support of their conclusion that the renewal clause does not prevent PacifiCare from unilaterally terminating the contract. GovGuam emphatically states that these cases say the opposite. These cases uphold the validity of the continuation clause.

The remedy of unilateral termination fails to meet the "essence test."

In *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, the U.S. Supreme Court formulated the "essence test". Under the essence test, an arbitrator is confined to the interpretation and application of the contract that contains the arbitration clause. The arbitration award must draw its essence from the contract.

Did the Arbitrators exceed their authority? Did they manifestly disregard the law? Did they fail to meet the essence test? The Plaintiffs say hat they did while the Defendant says that they did not. It appears that the underlying reason for Plaintiffs contention that the arbitrators did exceed their authority, disregard the law and fail to meet the essence test emanates from the arbitrators' alleged erroneous legal conclusion reached by the arbitrators is not a ground for vacating an award. Indeed, in *Tatibouet v. Ellsworth*, 54 P. 3d 397, (Hawaii) 2002, the Hawaii Supreme Court emphatically pointed out that an error in the law in a decision reached by the arbitrators is not a basis for setting aside the award. The Supreme Court did point out, however, that an arbitrator's award is valid when it draws its essence from the arbitration agreement. Vacatur of an arbitration

award is not a proper remedy for arbitrators' imperfect understanding of law. The concurring opinion did point out that:

> Concurring Opinion of ACOBA, J., with whom RAMIL, J., Joins.
> I agree that arbitrators may be held to have exceeded their powers if they go beyond the boundaries of the arbitration agreement—a matter we discern from the language of the arbitration agreement itself. *See Wayland Lum Constr., Inc. v. Kaneshige,* 90 Hawaii 417, 422, 978 P.2d 855, 860 (1999) ("The scope of an arbitrator's authority is determined by the agreement." (Citing *Clawson v. Habilitat, Inc.*, 71 Haw. 76, 78, 783 P.2d 1230, 1231 (1989); *Mathewson v. Aloha Airlines, Inc.*, 82 Hawaii 57, 75, 919 P.2d 969, 987 (1996).)).
> Since the "Governing Law" provision controlled the construction of the Agreement and the mandatory arbitration clause was part of that agreement, *see id.* ("[A]n arbitration agreement should be construed as a whole, and its meaning determined from the entire context." (Citations omitted.)), arguably the arbitrators were bound to construe the agreement in accordance with the governing law specified in the governing law provision, *see, e.g.Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (stating that a general choice of law provision in an agreement accompanied b a separate arbitration clause should be read to incorporate into the agreement the "substantive principles that [the

state court] would apply, but not...special rules limiting the authority of arbitrators" when the arbitration came within the Federal Arbitration Act); *Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 434 S.E.2d 281, 284 (1993) (holding that the governing law provision of a contract, although separate from the arbitration agreement clause, "indicates the parties' agreement to have the validity and construction of the contract determined by arbitrators according to the substantive law").

However, assuming that that is the case, any error in the application of Hawaii law by the arbitrators would be beyond our purview. See *Mathewson*, 82 Hawaii at 70, 919 P.2d at 982 ("An arbitration award, if made in good faith, is conclusive upon the parties, and ...neither of them can be permitted to prove that the arbitrators decided wrong either as to the law or the facts of the case.'" (Quoting *Board of Directors of Ass'n of Apartment Owners of Tropicana Manor v. Jeffers*, 73 Haw. 201, 214, 830 P.2d 503, 511 (1992) (citations omitted).)). It is not evident from the facts that the arbitrators expressly chose to disregard Hawaii law, so as to constitute" misbehavior[,]" Hawaii Revised Statutes (HRS) §658-9(3) (1993), or to indicate that the arbitrators "so imperfectly executed [their powers], that a mutual, final, and definite award, upon the subject matter submitted, was not made[,]" HRS §658-9(4). For the foregoing reasons, I concur in the result.

Hawai'i, 2002.

Tatibouet v. Ellsworth

In ultimately reaching its decision herein, the Court must not concern itself whether the arbitrators would have reached the same conclusion based upon those factors made in oral arguments to the Court during the hearing of the motions; i.e., whether PacifiCare should be forced to continue in a business enterprise with the government when it is loosing $400,000.00 per month in providing medical coverage based upon fiscal year 2003 rates or whether the effect o the death spiral analysis is such that no rate given to PacifiCare can allow it to remain a viable business entity within Guam's business community. The Court is very sensitive to these concerns of PacifiCare and notes that PacifiCare is not a non-profit business like its predecessors was, but is now a profit making corporation. As a profit making corporation, it must be allowed to make a profit to continue its economic viability within Guam's community. PacifiCare's continued viability is of great importance to the Court because of its major economic importance to Guam as it provides support for an economy especially at a time when such support is sorely needed. Most important, it provides a base for employees and retirees of the government of Guam [just like similarly situated individuals in the employ of the federal government and private employment] to receive medical and dental coverage. Medical coverage remains a necessary and essential item in the lives of individuals. Thus, PacifiCare's continued economic viability is of greatest concern and is essential to this community.

Despite the arguments above, the Court can only make its decision herein, not on what was not decided by the arbitrators [whether the result of their decision cold have been supported by the factors mentioned above or any other plausible factor], but only on what was decided. This is of critical importance. The arbitrators decided that:

> 1. PacifiCare made offers for renewal of medical coverage for fiscal year 2004 at rates and benefits that PacifiCare deemed appropriate. The Government of Guam did not accept said offers. Under the provisions of the Health Insurance Portability and Accountability Act, 42 USC300 gg-12(a), PacifiCare met it[s] obligations and is under no further obligation to negotiate or to provide any medical health insurance plan to the Government of Guam for fiscal year 2004.
>
> 2. PacifiCare is also relieved of any obligation to renew its contract with the Government under the "continuing clause" in its Agreement with the Government of Guam. Government of Guam vs. FHP, Inc., et al., Civ. Nos. CV0809-89, CV0755-89, CV1200-89 and CV1250-89 (Super. Ct. Guam), on appeal as Civ. Nos. 90-00014A, 90-0002[6]A, 90-00040A (D. Guam App. Div. 1991).

With regards to the above decision, the Arbitrators made only two findings of fact. They found that (1) PacifiCare made offers for renewal of medical coverage to the GovGuam and (2) GovGuam rejected those offers. Applying the standard of review under *Sumitomo,* these findings of fact cannot be said to be clearly erroneous, but rather states the correct nature of the events which lead to the impasse between the parties during the negotiations.

Having made the said findings, **the arbitrators made two conclusions of law.** They concluded that **(1)** PacifiCare met its obligations under the provisions of the Health Insurance Portability and Accountability Act, 42

USC300 gg-12(a), and was under no further obligation to negotiate or to provide any medical health insurance plan to the Government of Guam for fiscal year 2004, and **(2)** PacifiCare was also relieved of any obligation to renew its contract with the Government under the "continuing clause" in its Agreement with the Government of Guam, citing a series of cases which interpreted the continuing clause in the agreement, namely, Government of Guam vs. FHP, Inc., et al., Civ. Nos. CV0809-89, CV0755-89, CV1200-89 and CV1250-89 (Super. Ct. Guam), on appeal as Civ. Nos. 90-00014A, 90-0002[6]A, 90-00040A (D. Guam App. Div. 1991).

Conclusions of law are not findings of fact but involved questions of law. Under *Sumitomo*, questions of law are reviewed *de novo*. Thus, the arbitrators' legal conclusions are reviewed *de novo*. With regards to the arbitrators **first legal conclusion**, GovGuam argues that nothing in HIPPA authorizes the arbitrators to relieve PacifiCare from providing medical coverage to the government. The government points out that the opposite result is required because HIPPA requires the renewal of existing medical coverage at the option of the plan holder (GovGuam), rather than the termination of medical coverage. With regards to the arbitrators' **second legal conclusion**, GovGuam argues that the series of cases in the Superior Court of Guam and the Appellate Division of the District Court [referred to by the arbitration in relieving PacifiCare of any further obligation to renew its contract with GovGuam under its "continuing clause"] all hold that the "continuing clause" provision in the Agreement is valid and binding and the government could not terminate the agreement.

After reviewing the legal memoranda submitted herein, the Court finds that the arbitrators committed an error of law in their decision. The Court must then ask itself

whether this error of law simply is an honest error by the arbitrators in the application of federal, local, contract, or common law or does it represent a manifest disregard for the law. Moreover, the Court must ask itself whether the error in law drew its essence from the agreement between the parties and further, whether the arbitrators exceeded their authority in deciding to terminate the agreement when termination was not an issue of impasse between the parties[8].

ESSENCE OF THE AGREEMENT BETWEEN THE PACIFICARE AND GOVGUAM

A discussion of the essence of the agreement between the parties is significant is a determination of this matter. The Agreement between PacifiCare and GovGuam (a relationship that has been in existence since 1973) draws its essence on its ability to provide a continuing contractual relationship whereby PacifiCare would provide medical and dental benefits to the government of Guam and the government of Guam would subscribe to those benefits at rates agreed upon by the parties. The agreement contains a "continuing clause" which obliges the parties to meet prior o the expiration of a fiscal year to discuss and negotiate benefits and rates for the next fiscal year. The parties in their thirty (30) year relationship has generally agreed upon benefits and rates for the ensuring fiscal year. When there has been no agreement, that dispute has been submitted to arbitration. In the late 1980's when the parties were not able to reach agreement as to rates, the rates were set by arbitrators. The award was confirmed by the court and rates were made retroactive to the October 1 of the ensuing fiscal year.

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[8] The government raises a fundamental issue herein and that is whether termination is an arbitrable matter. The Court notes that questions whether an issue is arbitrable is within the proper cognizance of this court.

Thus, the Court finds that the essence of the Agreement between the parties is its continuity and the method it has provided to promote continuity. **The very essence of the agreement mandates and demands continuity. When an arbitration award grants termination of the agreement without exploring and deciding the dispute which lead the parties to impasse (disagreement as to benefits and rates), the arbitration award goes against the very essence of the agreement.** The award does not foster nor does it promote the essence of the agreement, its continuity. The award has judiciously removed the "continuing clause" from the reach of one party and relieved the other of its mandate.

MANIFEST DISREGARD OF THE LAW

Because the purpose of the mandate of continuity is so apparent in the agreement, it appears that the arbitrators manifestly disregarded contract and common law in its award. It is argued by PacifiCare that federal law (HIPPA) preempts state law and authorizes the arbitrators to terminate the contract when GovGuam rejected PacifiCare's medical coverage offers. As the government has pointed out, HIPPA provides no basis for the termination of health coverage because a health insurance issuer has made an offer which has been rejected. PacifiCare states that GovGuam was late in payments and the arbitrators could have terminated the agreement because of nonpayment of premiums under 42 U.S.C. §300gg-12(b)(1). There is no finding of fact, however, by the arbitrators that the government was in default. Assuming, however, that there was such authority under HIPPA, the Court notes HIPPA was enacted years after the agreement between PacifiCare and GovGuam and as a later enacted federal statute, it could not impair the

obligation of the contract as between the parties under constitutional law principles.

ACTNG IN EXCESS OF THEIR AUTHORITY

Court also finds the arbitrators' termination ruling to be of great significance. The arbitrators were bound to construe the agreement and all other agreements reached b the parties in relationship to their award. Enclosure 9A of the procedures for negotiations executed by both parties required the parties to bargain in good faith. It provided hat an impasse should only be declared after all issues had been discussed and the parties were unwilling to make further compromises. The arbitrators were bond by the following provision:

> **4. A request for arbitration shall be confined to those issues to which resolutions was earnestly sought at the negotiating table but was not reached.**

During negotiations, the parties **reached impasse solely on the medical coverage issue.** In this regard, the Court notes that the parties did not reach agreement on dental benefits and rates. Based upon Enclosure 9A, the arbitrators were bound to decide the only issue which resulted in an impasse, i.e., medical coverage.

Thus, the Court finds that the arbitration exceeded their authority when they concluded that PacifiCare was no longer required to provide medical and dental benefits to GovGuam and in the process of doing so, they relieved PacifiCare from any further obligation under its contract with the government of Guam. In further making this finding, the Court holds that the arbitrators' award must be limited to those issues which created an impasse and not

other issues. The Court comes to this conclusion because the arties never reached an impasse on dental benefits and rates, yet the arbitrators disregarded this agreement and made dental coverage a matter which came under the termination ruling. The Court further notes that an award terminating coverage of dental benefits and rates also goes against the essence of the contract (an agreement which fosters continuity), not because there was a lack of agreement but especially since the parties reached agreement as to benefits and rates. The arbitrators exceeded their authority because they terminated dental coverage when the parties had reach an agreement as to its benefits and rates. The mandate of the "continuing clause" requires its continuity, rather than its termination.

ASSESSING RELEVANT FINDINGS AND CONCLUSIONS

It is with the aforesaid findings and conclusions that direct this court to decide that it must vacate the arbitration award entered on October 1, 2003. The Court hereby sets aside the said award and remands the matter to the arbitrators to resolve the dispute between the parties, i.e., the extent of medical coverage and the corresponding rates that must be in order between the parties for Fiscal year 2004.

It is not the intent of the Court by this order to place PacifiCare in a situation where it would be face with heavy losses for doing business with the government of Guam by continuing to provide medical coverage to its employees and retirees. In remanding this matter to the arbitrators, all that the Court does is to give an opportunity to allow the dispute mechanism established in the parties' agreement to move forward so that this established mechanism can resolve the dispute between the parties. The parties came into dispute and reached impasse because they did not reach agreement

as to medial benefits and rates for Fiscal Year 2004. The parties' dispute regarding medical benefits and rates was never presented to the arbitrators for resolution.

In submitting this dispute to arbitration, the arbitrators may properly decide on the type of coverage [and the corresponding rate] which PacifiCare can feasibly offer to GovGuam to remain a viable business enterprise in the wake of its contractual relationship with the government of Guam.

The Court also notes that PacifiCare initially presented two types of medical coverage proposals to the government of Guam. Nothing in arbitration prevents PacifiCare from presenting the same proposals and asking the arbitrators for appropriate rates that it believes would allow the company to make a return of profit. By the same token, nothing in arbitration would prevent the government of Guam from asking that benefits include certain types of coverages or detailing reasons why rates should be a certain amount. The Court again reiterates that the purpose of its ruling is to allow a dispute which has reached impasse to move to a resolution stage (arbitration), the mechanism for dispute resolution under an agreement which fosters continuity. Proceeding to arbitration to determine medical benefits and rates is in furtherance of the continuation policy established by the "continuing clause" provision.

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[9] Conclusion

Based upon the reasons stated above, the Court finds that the arbitration award referenced herein did not draw its essence from the Agreement of the parties; that in relieving PacifiCare from any further obligations under its agreement with the government of Guam and terminating their contractual relationship, the arbitrators exceeded their authority and expressed manifest disregard for contract and common law. The Court therefore vacates[10] the arbitration award and remands the matter to the arbitrators to arbitrate appropriate medical benefits and rates between PacifiCare and GovGuam for Fiscal Year 2004. In remanding this matter to the arbitrators, the Court respectfully asks the arbitrators to commence and conclude their arbitration and announce their decision by October 28, 2003[11]. The matter will be set for further proceeding in this Court on October 30, 2003 at 2:00 p.m.

Este I sinneda I Kotte[12].

So Ordered this 20th day of October, 2003.

Joaquin V.E. Manibusan, Jr.
Judge, Superior Court of Guam

[10] As the Court had advised the parties during oral arguments, after eight years on the bench this day, this case has become the most difficult for the Court to decide. The Court has great respect for the arbitrators in this matter and further notes that its review of their decision is quite narrow.

[11] Subject however to time constraints as with regards to an appeal.

[12] These are the findings of the Court.